of $44,906.32 became receivable by him "as a lump sum by way of gratuity, deferred pay or otherwise" The Special Commissioners took the view that the word "otherwise" in the proviso was wide enough to include the sum of $44,906.32 whether or not that word was interpreted *ejusdem generis* with "gratuity, deferred pay" in the said proviso.

It is submitted on behalf of the respondent that the Special Commissioners' view is wrong for two reasons. First, it is said that section 25(4) does not apply to the facts of the case as there is no overlapping period. The withdrawal from a provident fund, it is contended, is not the same as payment of gratuity or a deferred pay, so that section 25(4) and proviso (a) thereto do not apply to the facts of the case. Secondly, it is contended that if the section does apply, the facts do not come within the proviso. Curiously enough counsel for the appellant submitted that section 25(4) is meant to cover payment in the nature of gratuities or retirement benefits where it is impossible to ascertain to which period the payments relate and that the words "gratuity, deferred pay or otherwise" cannot be interpreted *ejusdem generis* to include moneys paid out of a provident fund. It is next submitted that section 25(4) applies only if the gross income is not identifiable in respect of any particular period, and it is lastly submitted that the provident fund being in respect of a definite period, the amount of $44,906.32 should be spread out over the whole of that period for purpose of taxation.

The fallacy of the arguments put forward on behalf of the appellant lies in the fact that there is no provision in section 25 for a gratuity or deferred payment to be spread out over the whole of the period in respect of which it was paid. As regards the arguments advanced on behalf of the respondent, I do not think there can be any difference between withdrawal from a provident fund and payment out from a provident fund. It is common knowledge that a gratuity is more often that not related to a person's period of service, and so was the amount paid out of the provident fund in this particular case. After all, what was paid out to the appellant was the sum total of the contributions which his employers had paid into the provident fund. Whether payment is actual as in the case of a provident fund or notional as in the case of a gratuity which is worked out at the time of a person's retirement on the basis of his length of service, to my mind, makes no difference as regards the true nature of the payment. Bearing that in mind I am of the opinion that the Special Commissioners were right in coming to the conclusion that the word "otherwise" in proviso (a) was wide enough to include the sum of $44,906.32. I would go a step further and say that even under the *ejusdem generis* rule that sum should be treated as a payment in the nature of a gratuity.

I would therefore dismiss the appeal and the cross-appeal and confirm the deciding order made by the Special Commissioners. In all the circumstances of the case I will make no order as to costs.

Appeal and cross-appeal dismissed.

Solicitors: *Dato Clough Thuraisingham, Raj & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. T.

[A.C.J. (Pawan Ahmad J.) December 11, 1973]
[Malacca — Originating Motion No. 9 of 1973]

Income Tax — Deduction — Deduction for child — Daughter who is married but whose marriage has been annulled for non-consummation — Whether daughter an "unmarried child" — Income Tax Act, 1967, s. 48(3)(a)(i).

In this case the respondent had claimed a deduction for his daughter, who was receiving full-time instruction for a Ph.D. degree in England. She had been married. but the marriage had been annulled on the application of her husband on the ground of her wilful refusal to consummate the marriage. The Director-General of Inland Revenue disallowed the claim for a deduction but on appeal to the Special Commissioners, it was held that the respondent was entitled to the claim for deduction as the daughter had reverted to the status of an unmarried daughter consequent upon the annulment of her marriage. The Director-General of Inland Revenue appealed to the High Court.

Held: the decree of nullity in this case did not have the effect of reverting the daughter to the position of an "unmarried child" for the purpose of section 48 of the Income Tax Act, 1967 and therefore the respondent was not entitled to the deduction which he claimed.

Cases referred to:-

(1) *Re Sergeant* 26 Ch. D. 575.
(2) *Dalrymple* v. *Hall* (1880-1881) 16 Ch. D. 715.
(3) *Dodworth* v. *Dale* [1936] 2 All E.R. 440.
(4) *Re Wombwell's Settlement* [1922] 2 Ch. 298.

ORIGINATING MOTION.

Mohamed bin Mohamed Said (Federal Counsel) for the appellant.

Respondent in person.

Pawan Ahmad J.: This is an appeal by the Director-General of Inland Revenue by way of Case Stated from a deciding order of the Special Commissioners of Income Tax.

The present respondent had appealed to the Special Commissioners of Income Tax in respect of his assessment of Income Tax for the year of assessment 1972 as contained in the Notice of Assessment dated 26 August 1972.

The question for the determination by the Special Commissioners was whether in the ascertainment of his chargeable income for the year of assessment 1972, the respondent was entitled to a deduction in respect of his daughter named P. (born on 18 May 1948) under section 48(3)(a)(i) of the Income Tax Act, 1967.

The Special Commissioners of Income Tax found as a fact that P. (f) is the eldest of the three children of the respondent — that she was married to one K. at Kuala Lumpur on 10 August 1966 — that she separated from her husband two months after marriage and that on the petition of her husband the High Court at Kuala Lumpur in Divorce Petition No. 22 of 1971 on 4 October 1971 pronounced and declared the marriage "to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, by reason of the wilful refusal of the respondent to consummate the marriage".

The Special Commissioners of Income Tax also found that the respondent has supported P. before and after the annulment of marriage and that she is at present receiving fulltime instruction for a Ph.D. De-

gree in Neurophysiology and that in the year 1971 the respondent had expended $5,200 for her maintenance and education at Queen Mary's College, London.

The respondent's claim to a deduction in the maximum sum of $1,500 under section 48(3)(a)(i) of the Income Tax Act, 1967 was disallowed by the Director General of Inland Revenue in the ascertainment of the respondent's chargeable income for the year of assessment 1972.

The sole point in issue before the Special Commissioners was whether in the circumstances of the case, P. reverted to the status of an "unmarried child" within the meaning of that term in section 48 of the Income Tax Act, 1967 consequent upon the annulment of her marriage on 4 October 1971.

Section 48(3)(a)(i) of the Income Tax Act, 1967 reads as follows: —

"(3) Where for a year of assessment any individual is entitled under subsection (1)(b) to a deduction (in this subsection referred to as the ordinary deduction) —

(a) in respect of a child who at any time in the basis year for that year of assessment if over the age of sixteen years and —

(i) is receiving fulltime instruction at a university, college or other establishment (similar to a university or college) of higher education ...

in a place outside Malaysia and the Republic of Singapore."

Section 48(1)(b) and (c) qualify the word child referred to in section 48(3)(a) as being "an unmarried child".

At the hearing before me the appellant was represented by Encik Mohamed bin Mohamed Said, Federal Counsel, whilst the respondent who was not represented by counsel, appeared in person. Counsel for the appellant submitted that the ordinary and primary meaning of the word "unmarried" is "never having been married" and not "not having a husband at any one time". He submitted, quite rightly, that the issue before the court was whether after the divorce of P., she reverted to the state of an "unmarried child" as envisaged under section 48 of the Income Tax Act, 1967. He also submitted that in the absence of any definition of "unmarried child" in the Income Tax Act, the words should be given their ordinary meaning.

I will begin by quoting a passage from "Words and Phrases Legally Defined" Vol. 3; I-N at page 223 which reads as follows: —

"A marriage is voidable where either party is impotent, that is, where there is practical impossibility subsisting at the time of marriage of consummating the marriage....

In addition to any other ground on which a marriage is by law void or voidable, it is by statute voidable on any of the following grounds: (1) that the marriage has not been consummated owing to the wilful refusal of the respondent spouse to consummate the marriage; ..."

In Divorce Petition No. 22 of 1971 in which P. was the respondent the court pronounced and declared the marriage —

"to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, by reason of the wilful refusal of the respondent to consummate the marriage and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent with immediate effect."

It is interesting to note that the wording of the form of the decree does not strictly comply with the form normally made use of in such cases, which is Form 94 of Appendix IV at page 1517 of *Rayden on Divorce* 8th Edition. The words used in the decree are *"with immediate effect"* (the italics are mine), whereas on Form 94 the words are "unless within three months from this date sufficient cause be shown to the court why this decree should not be made absolute." It is difficult for me to say why these words were omitted from the decree and why the court had thought it fit to use in their place the words "with immediate effect". Could it be that the court had intended that the nullity of the marriage was to take effect from 4 October 1971? This matter was not raised either before the Special Commissioners or before me and I therefore do not intend to give it any importance for the purpose of the appeal before me.

It is the contention of the Director-General of Inland Revenue that the decree of nullity of marriage cannot revert P. to her former status of an "unmarried child" because her marriage though voidable was not void *ab initio*. In *Re Sergeant*[1] page 575 Pearson J. at page 576 said:

"I cannot say that I entertain any doubt whatever about this case. The question is what is the meaning of the word 'unmarried'. I agree that you must construe the word which is capable of two meanings according to the context in which you find it. It may mean either 'never having been married' or 'not having a husband' at the time in question. In order not to defeat the evident intention of a testator the court have in some cases held that the word meant 'not having a husband', but I think its primary or natural sense is 'never having been married.' ... if I was asked to construe the word as occurring in an absolutely colourless instrument, I should construe it 'never having been married'."

In *Dalrymple* v. *Hall*[2] it was held that in the absence of context showing a contrary intention, the word "unmarried" must be construed according to its ordinary or primary meaning, as "never having been married". Hall V.C. at page 716 said:

"I must construe the word 'unmarried' according to its ordinary meaning. It is said that the ordinary meaning is 'without ever having been married'. If this is so, I must adopt it; and, having regard to what has been said upon the subject in the authorities, I must take it to be so.... This is a case without any context to indicate the meaning of the word 'unmarried', and I must, therefore, attribute to it its ordinary meaning, namely, without ever having been married'."

In *Dodworth* v. *Dale*[3] the question before the court was whether a decree of nullity of marriage has such retrospective effect as to enable the Revenue Authorities to make additional assessment upon the male party to the void marriage. In that case the learned judge held that it had no such effect and did not afford anyone an opportunity of reopening concluded matters.

At the hearing before them, the Special Commissioners of Income Tax, on their own consulted the case of *Re Wombwell's Settlement*.[4] In that case the marriage had been declared to be and to have been absolutely null and void on the ground of the husband's impotence. There the court held that "until the said intended marriage" meant a valid and effectual marriage, and as the marriage has been declared null and void *ab initio*, the settler was absolutely entitled to the settled funds under the express trust in his favour. Russell J. at page 305 said: —

"The result of a decree of nullity is that not only are the parties now not married but they never were. *There never was any valid marriage...*" (The italics are mine).

and at page 306 Russell J. went on to state:

"Those expressions show that, in the opinion of the judges of the Court of Appeal, a marriage which has been annulled on the ground of impotence was never a marriage at all, although no doubt, it is recognized as valid until one of the parties to it takes proceedings to annul it."

and at page 307 said:

"Therefore there never was a marriage although the ceremony was gone through, and the parties lived together as man and wife after that date. The marriage is pronounced null and void *ab initio*. Not only are they not now married, but they never were."

A party to a marriage is said to be impotent where there is a practical impossibility subsisting at the time of the marriage of consummating the marriage. In regard to the impotency of a male spouse, under no circumstances is it possible for the female at or before her marriage to him to know about his physical defect as regards impotency. In such circumstances, it is clearly no fault of the female spouse in getting married to someone who is impotent and it is proper and reasonable therefore to say that if the female spouse subsequently obtains a decree of nullity on the ground of impotency of the husband such decree should have the effect of rendering the marriage void *ab initio* and restore the female to the position of not having been married at all in the eyes of the law. I am therefore in entire agreement with the meaning in the case of *Wombwell's Settlement*, but what I have to decide is whether the ruling in that case can apply to the present case before the court. Here we have the case where the female spouse namely P., daughter of the respondent, wilfully refused to consummate the marriage. It is solely her conduct that has resulted in the decree of nullity. I am in entire agreement with the cases quoted above and with the submission of counsel for the appellant that the word "unmarried child" in section 48 of the Income Tax Act, 1967 must be given its ordinary meaning which in the words of Pearson J. in *Re Sergeant* means "never having been married". With due respect I must say that I am unable to agree with the Special Commissioners that "the marriage of P. was voidable yet upon its annulment by the High Court it became void *ab initio*." I hold the view that the case of *Re Wombwell's Settlement* can be distinguished from the present case, for here we are dealing not with the question of impotency, but with a question of wilful refusal to consummate the marriage.

After having considered the various authorities I have come to the conclusion that the decree of nullity on the ground of impotence should always have the effect of nullifying the marriage *ab initio* and thus putting the parties in a position of never having been married. The reason for this is that the marriage should or would never have taken place if the impotence of one spouse had come to the knowledge of the other at or before the time of the marriage. On the other hand in the case of wilful refusal to consummate the marriage the decree cannot possibly have the same effect because both the parties entered into the bond of marriage with a view to consummation, and wilful refusal to consummate by one of the spouses amounts to a deliberate breach of such bond and such breach can be deemed to have been committed only from the time of the wilful refusal to consummate. I am therefore of the view that a decree of nullity in such circumstances cannot have the effect of nullifying the marriage *ab initio*.

I therefore rule that the decree of nullity in this case does not and cannot have the effect of reverting P. to the position of an "unmarried child" for the purpose of section 48 of the Income Tax Act, 1967. In view thereof, the respondent is not entitled to the deduction that he has claimed and I therefore set aside the deciding order of the Special Commissioners dated 9 August 1973 and in its place substitute an order that the Notice of Assessment dated 26 August 1972 be confirmed.

As to costs I have taken into account that the respondent was unrepresented and that the amount of money involved is by no means large. At the hearing before me both parties indicated that they would not press for costs irrespective of the result of the appeal. For this reason, I order that each party will bear his own costs.

Order accordingly.

LIM HENG HOO v. TAN HOCK HAI & ORS.

[F.C. Azmi L.P., Gill and Ali F.JJ.) December 13, 1973]
[Kuching — Federal Court Civil Appeal No. 14 of 1973]

Practice and Procedure — Action dismissed for want of prosecution — Failure to enter action for trial within prescribed time — No valid excuse for delay — R.S.C. 1957, O. 36.

In this case the appellant, as tenant, had brought an action against the respondents, his landlords, claiming damages and an injunction for nuisance or trespass. Shortly after the filing of the writ he obtained a temporary injunction, the effect of which was to restrain the respondents from continuing their development work on the part of the land not occupied by the appellant but close to the house in which he lived. All the pleadings had been delivered and the pleadings closed some time in May 1971. In January 1972 the respondents applied to have the action dismissed for want of prosecution on the ground that the appellant failed to enter the action for trial within the time prescribed by the Rules of the Supreme Court.

The application was allowed in the High Court and the appellant appealed.

Held: there was a prolonged and inexcusable delay in this case and such delay prejudiced the respondents and therefore the High Court had properly exercised its discretion in allowing the application for the action to be dismissed for want of prosecution.

Case referred to:-

(1) *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 1 All E.R. 543.

T. O. Thomas for the appellant.

J. Grimberg (*Mathew Chan* with him) for the respondent.

Ali F.J. (read by **Lee Hun Hoe Ag. C.J. (Borneo)**): We dismissed this appeal on the date of hearing and now give our reasons for so doing.

The appeal was against the judgment of the High Court at Kuching, Sarawak whereby on an application by the respondents the appellant's action was dismissed for want of prosecution. The appellant, as